IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.5859 OF 2004

Pradeep Natvarlal Mistry ..Applicant

Vs.

The State of Maharashtra ..Respondent

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Mr.M.K.Kochrekar Advocate for Applicant
Mr.D.P.Adsule, A.P.P. for State

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATE OF RESERVING THE ORDER : 05.08.2005
DATE OF PRONOUNCING THE ORDER : 17.08.2005

P.C.

1. Heard the learned advocate for the applicant and the learned A.P.P. for the State.

2. The applicant is facing the prosecution in C.R.No. 18 of 1998 of A.C.B. GMB. The said case is before the learned Special Judge, Mumbai. The said case is registered on the complaint of one Shri.Rajendra Kuril against the applicant who was

Junior Engineer (Building and Factory department) R-North Ward, Mumbai Municipal Corporation. It is the case of the complainant that the applicant-original accused demanded a bribe of Rs.5000/- from him for not demolishing the unauthorised construction work which was carried out by the complainant. The said demand was made by the applicant in person from the complainant on 11.4.1998. The complaint came to be lodged. After following pre-trap formalities, it was found that the accused came to the Hotel where it was agreed that the bribe would be given. Accordingly, the complainant handed over the agreed upon amount to the applicant. The accused-applicant was caught red-handed.

3. In the said case, an application was preferred by the prosecution for grant of 'A' summary i.e. Criminal Misc.Application No. 227 of 2000, on the ground that the Municipal Commissioner, Mumbai Municipal Corporation has refused to grant sanction to prosecute the applicant as in his opinion, there was no concrete prima facie case against the accused. The said application was preferred on

5.6.2000. The learned Special Judge by order dated 12.6.2000 did not grant 'A' summary but directed that the matter be resubmitted to the Commissioner for reconsideration.

4. Pursuant to the order dated 12.6.2000 the then Municipal Commissioner re-examined the matter and found no reason to change the decision taken by his predecessor. Hence, the prosecution again prayed for 'A' summary i.e. 'A' summary be granted as prayed for in Cri.Application No. 227 of 2000.

5. The applicant-acused has also preferred an application for discharge. Both these applications i.e. application for 'A' summary and application for discharge came to be disposed of by common order dated 26.5.2004 the learned Special Judge rejected both the applications. Being aggrieved by the order dated 12.6.2000 and 26.5.2004 this application has been preferred.

6. As far as first order dated 12.6.2000 wherein the Special Judge refused to grant 'A' summary and directed to reconsider the matter, I find no error

in the said judgment. The Magistrate is not bound to accept the report submitted by the police. It has been so held by the Supreme court in the case of **Union of India Vs. Prakash P.Hinduja and another; [(2003) 6 S.C.C. 195]**.

. In the decision of the Supreme Court in the case of **Mansukhlal Vithaldas Chauhan Vs. State of Gujrat reported in 1997**, the High Court directed the State Government to grant sanction for prosecution. The Supreme Court held that sanction being granted on the directions of the High Court was invalid because there was no independent application of mind by the authority. The Supreme Court observed that the High Court's directions directing the State Government to grant sanction had taken away the discretion of the authority not to grant sanction and it was left with no choice but mechanically accord sanction in obedience of the mandamus issued by the High Court. In such case, the Supreme Court observed that sanction was invalid. It is clear that the Court cannot direct the sanctioning authority to grant sanction, however, it is pertinent to note that in the said

decision the Supreme Court has not observed that Court could not have sent back the matter for reconsideration on the issue of grant of sanction. From the observations in the case of Mansukhlal Chavan, it is clear that the Court cannot direct sanctioning authority to grant sanction but the Court can direct the sanctioning authority to reconsider the matter, because in such case, all the alternatives would be open to the sanctioning authority i.e. whether to grant sanction or not to grant sanction. In the present case also, the Special Court has not directed the sanctioning authority to grant sanction but has only asked the sanctioning authority to reconsider the matter. In view of the decision of the Supreme Court in the case of Mansukhlal Chauhan, it appears that such an order can be passed and thus, in my view, such an option is also open to the Court when the report is submitted by the police. Thus, I find no error in the order dated 12.6.2000.

7. Mr.Kochrekar submitted that the Special Judge could not have directed the competent authority to reconsider the matter in respect of grant of

sanction. He submitted that the Special Judge had no authority to pass such an order. In support of this contention, he has placed reliance on the decision of this Court in the case of **R.N.Raje Vs.State of Maharashtra; [2001(1) Mh.L.J.416].** Mr.Kochrekar has placed reliance on the observations in the said judgment that "although the Special Judge was well within his powers to reject 'A' summary report, there was no authority vested in him to direct the police to file charge-sheet against the accused." In the present case, no such order has been passed by the Special Judge and hence, this decision would be of no help to the applicant.

8. Thereafter, Mr.Kochrekar has relied upon the decision in the case of **Omkar Sharma and etc. Vs.State of H.P.; [2003 Cri.L.J. 1024],** wherein it is observed that "once sanction is refused by competent authority, it cannot be revised/reviewed on the basis of same material". Reliance was also placed on the decision in the case of **Gulam Mohd. Lone Vs. Under Secretary, Government Home Department (Vig.) Jammu and Kashmir Government**

Jammu/Srinagar and others; **[1997 Cri.L.J. 173]**, wherein it is observed that "subsequent review of earlier order declining sanction by the sanctioning authority without disclosing any reason is not proper." Reliance was also placed on the decision in the case of **Jagdish Prasad Sharma Vs. The State; [1996 Cri.L.J.4424],** wherein it is observed that "once sanction was refused, the recalling of earlier order without there being any fresh material based on erroneous impression, is illegal." In all these decisions, though sanction was earlier refused, later sanction came to be granted. In the present case, sanction was earlier refused and on the second occasion also after reconsideration it came to be refused. Hence, these decisions cannot be said to be applicable to the facts of the present case.

9. The learned advocate for the applicant has submitted that if the sanction is not granted, the prosecution in respect of the applicant cannot continue and the said case deserves to be quashed. He has placed reliance on the decision of the Supreme Court in the case of **R.P.Kapur Vs. State**

of Punjab; [AIR 1960 Supreme Court 866], wherein it is observed that "Proceedings can be quashed where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. Mr.Kochrekar submitted that in the present case as no sanction has been accorded, the prosecution cannot continue. The facts in the said case and the present case are entirely different. The present case is mainly under the Prevention of Corruption Act and the point of sanction is involved in the present case. No such point was involved in the case of **R.P.Kapur (supra)**.

10. Reliance was also placed by Mr.Kochrekar on the decision of this Court in the case of **State of Maharashtra Vs. Nitendrasingh @ Nitin Kumarsingh Patil; [2005(1) Bom.C.R.(Cri.) 337]**. Reliance was placed on the observations in the said judgment that sanction is *sine qua non* for taking cognizance. It is pertinent to note that the said decision is in a case under M.C.O.C.Act and the

sanction was in respect of taking cognizance. The provisions under the M.C.O.C. Act and under the Prevention of Corruption Act being entirely different, this decision cannot come to the aid of the applicant. Reliance was also placed on the decision in the case of **Gokulchand Dwarkadas Morarka Vs. The King; [A.I.R. (35) 1948 Privy Council 82]**. In the said decision, it is observed that "facts in respect of which sanction was given should either be referred to on face of sanction or it must be proved by extraneous evidence that they were placed before the sanctioning authority. If this is not done then the sanction would be invalid". In the present case, as observed earlier, no sanction has yet been granted by the sanctioning authority, hence, this decision would be of no help to the applicant.

11. Thereafter, Mr.Kochrekar has placed reliance on the decision of a Single Judge of this Court in the case of **Ramesh Mahadeo Vs. Daulatrao Sawant; [1998[3) Mh.L.J. 229].** In said case, the accused came **to be** discharged only on the ground that sanction for prosecution was not obtained. Lastly,

reliance was placed by Mr.Kochrekar on the decision in the case of **State of Orissa and Ors. Vs. Ganesh Chandra Jew; [2004 All MR (Cri.) 1492 (S.C.)].** In the said decision, it is observed that no Court shall take cognizance of such offence except with the previous sanction. In the present case, it cannot be said that cognizance has been taken by the Special Judge, hence, this decision would also be of no help to the applicant. Moreover, in my opinion in view of the discussion in the next few paras, whether at all sanction is absolutely necessary in this case is an aspect which can be decided after the evidence is led. So also whether the act done by the applicant can be said to be done in discharge of his duty is an aspect which can be decided at the time of trial.

12. The contention of the learned advocate for the applicant is that the applicant being a public servant, sanction was necessary and as no sanction has been obtained in the present case, the applicant is entitled to be discharged. I do not find much merit in the above contention. In the **State of H.P. Vs. M.P.Gupta; [AIR 2004 S.C.730],**

the Supreme Court has observed thus:-

. "This Court has stated the legal position in Shreekantiah Ramayya Munipalli case and also Amrik Singh case that it is not every offence committed by a public servant which requires sanction for prosecution under Section 197 of the Code, nor even every act done by him while he is actually engaged in the performance of his official duties. Following the above legal position, it was held in Harihar Prasad Vs. State of Bihar as follows (SCC Page 115 para 66):

. "As far as the offence of criminal conspiracy punishable under Section 120-B read with Section 409 of the Indian Penal Code is concerned and also Section 5(2) of the Prevention of Corruption Act are concerned, they cannot be said to be of the nature mentioned in Section 197 of the Code of Criminal Procedure. To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197 of the Code of Criminal Procedure is, therefore, no bar.

. Above views are reiterated in State of Kerala Vs. Padmanabhan Nair. Both Amrik Singh and Shreekantiah were noted in that case. Sections 467, 468 and 471 IPC relate to forgery of valuable security, Will etc. forgery for the purpose of cheating and using as a genuine a forged document respectively. It is no part of the duty of a public

> servant while discharging his official duties to commit forgery of the type covered by the aforesaid offences. Want of sanction under Section 197 of the Code is, therefore, no bar."
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> [EMPHASIS SUPPLIED]

13. Useful reference may also be made to the decision of the Supreme Court in the case of **S.K. Zutshi and Anr. Vs. Bimal Debnath and Anr. reported in AIR 2004 SC 4174.** In the said case, it is observed that when an offence by a public servant is not in discharge of his official duty, in such case sanction to prosecute would not be necessary. Learned A.P.P. has submitted that question whether the accused has acted in his official course of duty or not and whether, therefore, sanction would be necessary or not, should be left open to be decided in the main judgment which may be delivered upon conclusion of trial. Reliance was placed on the decision of the Supreme Court in the case of **Raj Kishor Roy Vs.Kamleshwar Pande & Anr. reported in AIR 2002 SC 2861** wherein these very observations have been made in paragraphs 11 and 12.

14. From the decision in the case of **State of H.P. Vs. M.P.Gupta (supra),** it is clear that the sanction to prosecute would not be necessary in cases under section 5(2) of the Prevention of Corruption Act. The offences which the applicant is facing, is of similar nature. In view of the observations in the above cited judgments, sanction to prosecute may not be necessary. However, even assuming that sanction is necessary, the question whether the applicant has acted in official course of duty or not and whether, therefore, sanction is necessary or not, in my view in the light of the observations of the Supreme Court in the case of **Rajkishor Roy Vs. Kamleshwar Pandey (supra),** should be left open to be decided during the trial.

15. Looking to the facts as stated in para no.2 above, it is seen that there is prima facie material to show that the accused is involved in a case under the Prevention of Corruption Act. At the stage of framing of charge the Court need not consider whether this evidence is sufficient to hold the accused guilty of the charge but only

whether there is prima facie material against the accused. In view of the above legal position and the facts and circumstances of the present case, no fault can be found with the order of the learned Special Judge dated 26.5.2004.

16. Application is rejected.

[V.K.TAHILRAMANI,J.]